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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOHN NORMAN HOLTON, Defendant and Appellant.	G044729 (Super. Ct. No. 09WF2240) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury returned guilty verdicts against defendant John Holton on charges of dependent adult abuse, two counts of dissuading a witness, two counts of attempted voluntary manslaughter, two counts of assault with a semiautomatic firearm with findings of personal use, making a criminal threat with a finding of personal use of a firearm, and domestic battery with corporal injury. The jury found defendant not guilty on two counts of making a criminal threat, and two counts of attempted murder. The court sentenced defendant to 10 years in prison.

We conclude the trial court did not abuse its discretion when it denied defendant's motion to sever the trial of the charges on counts one through six against him relating to incidents on October 26, 2009 from charges seven through 12 relating to incidents on November 16, 2009. We affirm.

I

FACTS

October 26, 2009 Incident

On October 26, 2009, Fred Valenzuela called 911 and said: "I am a disabled person and I need some medical attention now." "I need someone" to "get me out now. My heart is going like crazy and my lungs are filling up." "I need some help here now. I don't care who comes in, I just need medical attention." He said he was "stuck in this room" and that he was "second stage Cerebral Palsy" and "confined to a wheelchair."

Defendant had "yanked a phone out of the wall." He told Valenzuela if he called the paramedics or police, defendant would kill him, kill his nurse and kill the officers. Valenzuela used a cordless phone to call for help. At some point during the call, defendant got on the line with the operator and said he was "[t]he guy that owns the house." He told the 911 operator to tell the paramedics to stop "because they will not get

on my property." The operator attempted to explain something to defendant, and defendant said "I know my rights honey."

At trial, Valenzuela testified he was living at defendant's house since September 15, 2009. He said he suffers from cerebral palsy and when he gets too nervous or excited, phlegm starts filling up his lungs.

During the morning of October 26, 2009, defendant was yelling. Valenzuela's caregiver, a practical nurse named Susan Babin, who was also a resident of the house and defendant's girlfriend, attempted to make a doctor's appointment for Valenzuela. Defendant became impatient and went to the front porch and turned up the radio "really loud" right outside Valenzuela's bedroom. The noise interfered with Babin's telephone call. Defendant came inside the house and marched up and down the hall. Babin could hear things being knocked over and breaking.

At one point, Valenzuela heard Babin crying for help. Defendant broke a mirror and came into Valenzuela's room with a piece of broken mirror and threatened to kill him. Defendant then "hit" Valenzuela on his nose and eye area with a small piece of broken mirror. Defendant also hit Valenzuela with his closed fist "at least twice." Valenzuela had a laceration of the right eye.

The police found defendant's residence in a state of disarray. The officers "collected approximately 19 rifles and BB gun items and, approximately 12 crossbows or bow and arrows along with arrows." Ammunition was also found and two of the guns were loaded.

November 16, 2009 Incident

On November 16, 2009, defendant received a copy of the police report from the October 26 incident. He was upset that the reporting party was Babin's sister. Defendant said the police had missed one of his weapons during the previous incident.

During the afternoon of November 16, a neighbor of defendant heard gunshots and "like some kind of arguments outside of the house." The neighbor observed defendant, Babin and "like a kind of bald guy" leaving the house. As he exited, defendant had a gun in his hand. The neighbor observed defendant shoot the gun in the direction of Babin.

Babin was on the back patio with Paul Lewis and a Ms. Johnston when defendant came outside. Defendant said: "Get in the house Babin. Get your ass in the house." Babin stood and defendant "walked outside the back door and got behind her and pushed her through the doorway." Babin fell down. Lewis hit defendant in his jaw after he pushed Babin. Defendant "immediately took off running down the hallway."

Defendant returned with a gun and put it to Lewis's head. Defendant said: "I will kill you. I will blow your brains out." Lewis started to leave the house, and had his back to defendant when he heard a shot. Lewis continued walking and heard a second shot. Then Babin screamed out, "my ear." She later told the police she "heard and felt the bullet pass by her head and that her left ear was still ringing." Lewis was starting to get into his vehicle when he heard the third shot. He was inside his vehicle when he "heard a big thud on the side" of it. Lewis then saw defendant drive away.

II

DISCUSSION

While defendant's opening brief contains two arguments, one was withdrawn in his reply brief. His remaining argument is that the trial court abused its discretion in denying his motion to sever the trial for the counts concerning the October 26 incident from those concerning the November 16 incident.

The trial judge gave a lengthy explanation when it denied defendant's motion to sever. Included were the following statements of the court: "So the court doesn't see this as a situation where the jury is going to hear evidence from one incident

and automatically vote guilty on the second incident just because of the first incident. I don't see that situation here. Especially in light of the fact that the other factors I mentioned, the cross-admissibility of the evidence, the same witnesses, the interconnected theme throughout this whole thing, the close proximity of the two incidents, the assaultive conduct, and the threats and the same class of crimes of the two incidents to me it doesn't rise to the level of mandating the severance."

"An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count." (Pen. Code, § 954.)

"[J]oinder of charged offenses ordinarily promotes efficiency [and] is the course of action preferred by the law. [Citations.]" (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.) Denial of a motion to sever is reviewed for an abuse of discretion. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244.) "The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried. [Citations.]" (*People v. Bean* (1988) 46 Cal.3d 919, 938-939.)

"The trial court properly found that both offenses belonged to 'the same [assaultive] class.' [Citation.] Joinder therefore was statutorily allowed. [Citations.] Defendant has never disputed this threshold point. [¶] Thus, defendant must show that a substantial danger of prejudice compelled severance. [Citation.] We ask whether the denial of severance was an abuse of discretion, given the record before the trial court. [Citation.] A pretrial ruling that was correct when made can be reversed on appeal only if joinder was so grossly unfair as to deny due process. [Citations.] [¶] Cross-admissibility is the crucial factor affecting prejudice. [Citation.] If evidence of one crime would be admissible in a separate trial of the other crime, prejudice is usually dispelled. [Citation.]" (*People v. Stitely* (2005) 35 Cal.4th 514, 531-532.)

Assaultive crimes against the person are crimes of the same class. (*People v. Maury* (2003) 30 Cal.4th 342, 395.) Here the incidents on both dates involved assaultive behavior against the person.

Evidence from the October 26 incident was necessary in order to place the November 16 incident in context. Defendant's discovery it was Babin's sister who reported the October 26 incident to the police infuriated him on November 16. His statement the police did not confiscate a 20th gun on October 16 would have likely made his November 16 threat of death believable.

Under the circumstances in this record, where the crimes on both October 26, 2009 and November 16, 2009 were of the same class, assaultive crimes against the person, and there was an interplay of evidence from both incidents, we cannot find error. The trial court did not abuse its discretion.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.